Before the
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In the Matter of Distribution of the 2014-2017 Cable Royalty Funds	)	**DOCKET NUMBER 16-CRB-0009-CD** **(2014-17)**

JOINT RESPONSIVE BRIEF OF CERTAIN 2014-17 CABLE PARTICIPANTS
ON ALLOCATION PHASE CLAIMANT CATEGORY DEFINITIONS

The undersigned parties ("Certain 2014-17 Cable Participants")[1] submit the following joint brief pursuant to the Copyright Royalty Judges' ("Judges") "Notice of Participants and Order for Preliminary Action to Address Categories of Claims" (dated March 20, 2019) ("Notice"), in response to the initial briefs filed on April 19, 2019 by Program Suppliers ("PS Brief") and Multigroup Claimants ("MGC Comments").

In their "Joint Comments of 2014-17 Cable Participants on Allocation Phase Claimant Category Definitions" ("Joint Comments"), the 2014-17 Cable Participants urged the Judges to adopt Allocation Phase categories and program category definitions that are identical to those used in prior cable royalty distribution proceedings.[2]

[1] The Certain 2014-2017 Cable Participants include all the signatories to the initial Joint Comments of 2014-17 Cable Participants on Allocation Phase Claimant Category Definitions except for Joint Sports Claimants ("JSC"), who are filing a separate Responsive Brief ("JSC Responsive Brief"). The Certain 2014-2017 Cable Participants join the arguments made in the JSC Responsive Brief, and understand that JSC joins in the arguments made in this Responsive Brief as well.

[2] *See* Joint Comments at Appendix A.

The changes proposed by Program Suppliers[3] and Multigroup Claimants[4] are unnecessary and ill-conceived and would produce confusion and inefficiency in these proceedings.

BACKGROUND

The fundamental purpose for which the compulsory license was enacted was to avoid the inefficiencies of a system in which every cable operator would have to negotiate a license with every program owner in order to be able to publicly perform the programs on every distant signal.[5] The cable royalty allocation and distribution process now administered by the Judges is intended to provide a more efficient alternative to that system.[6]

The Allocation Phase categories were developed as a natural and essential part of achieving this efficiency, since the category definitions principally[7] define groups of owners or distributors, not program content. The reason for this structure -- and its effect -- is that a

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3 *See* PS Brief at Appendix A.

4 *See* MGC Comments at 15-16.

5 Congress found "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 94-1476 (1976), at 89; *see Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc*., 836 F.2d 599, 602, 603 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (June 30, 1988) (Congress adopted the Section 111 statutory license "to address a market imperfection" due to "transaction costs accompanying the usual scheme of private negotiation . . . .")

6 *See Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 675 F.2d 367, 371-72 (D.C. Cir. 1982) (in the first cable royalty distribution proceeding, "[t]he Tribunal divided its proceeding into two 'phases,' based on the fact that the claimants to the Fund could easily be broken down into specific groups.") And because of that structure, the Tribunal did not need to address or resolve any "Phase II" issues for the several categories within which the claimants did not dispute their ultimate distribution shares. *See 1978 Cable Royalty Distribution Proceeding,* 45 Fed. Reg. 63026, 63028 (Sep. 23, 1980) ("1978 Determination").

7 The Devotional Claimants category is defined to include programs based in part on their content ("of a primarily religious theme") but also by their mode of distribution ("syndicated programs"). These programs were initially encompassed within the Program Suppliers category, which covers all syndicated programs, *see 1979 Cable Royalty Distribution Determination,* 47 Fed. Reg. 9879, 9890-9891 (Mar. 8, 1982)("1979 Determination"), and the identification of the category by reference to their content was used to distinguish them from the remainder of the syndicated programming category. *See 1980 Cable Royalty Distribution Determination,* 48 Fed. Reg. 9552, 9561 (Mar. 7, 1983).

manageably finite number of industry groups, each with the scope and incentive to pursue the interests of a broad group of constituents, undertake the complex job of gathering the necessary data and resources, identifying all claimants, establishing their respective Allocation Phase shares, and distributing all of the category's royalties.[8]

ARGUMENT

A. Program Suppliers' Arguments Are Ill-Considered

Program Suppliers acknowledge, first, that the category definitions are based on claimant types, not program content types.[9] They then argue, however, that the category definitions should be supplemented with a restrictive condition that would change them into ad hoc and unpredictable *claimant lists* rather than *categories of claimant types*.[10] And Program Suppliers go on to seek "clarifications" of the category definitions based on program content,[11] which would be confusing, underinclusive, and counterproductive.

1. The Judges Should Not Depart from the Unclaimed Funds Precedents.

No one disputes that unclaimed works are ineligible to receive statutory license royalties in these proceedings. But that has always been the rule. Contrary to Program Suppliers'

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[8] The principal claimant group representatives include the Motion Picture Association of America (Program Suppliers), the professional sports leagues and NCAA (Joint Sports Claimants), the National Association of Broadcasters (Commercial Television Claimants), Public Broadcasting Service (Public Television Claimants), the Performing Rights Organizations (Music Claimants), the Canadian Broadcasting Corporation (Canadian Claimants Group), and National Public Radio (NPR). The Settling Devotional Claimants are composed of claimant entities that produce programming within the Devotional Claimants category definition. All of these representative entities or organizations, in their roles in the Allocation Phase of the proceedings, agree to represent all claimants that fall within their respective category definitions, including claimants that are not members of the representative organization. *Order Regarding Discovery,* Consolidated Proceeding No. 14-CRB-0010-CD (2010-2013) (Jul. 21, 2016) ("*2010-2013 Order Regarding Discovery"*) at 4-5.

[9] PS Brief at 2.

[10] PS Brief at 3-7.

[11] PS Brief at 7-9.

suggestion, it does not "follow[]" from that rule that the longstanding program category definitions must be modified.[12] Indeed, that argument was considered and rejected by the Copyright Royalty Tribunal in 1980, during the first proceeding to distribute cable royalty funds.[13]

Program Suppliers' proposal would undermine the categorization and the two-phase structure of these proceedings that have promoted efficiency, predictability, and settlement for the vast majority of royalties in these proceedings for 40 years. The Judges should reject Program Suppliers' attempt to invalidate methodologies that have been developed and relied upon in past proceedings, and to inflict enormous discovery costs and burdens on all parties, through Program Suppliers' collateral attack on the longstanding program category definitions. At a minimum, the Judges should not make such a decision on this limited record during the course of briefing the category definitions to be used in this ongoing proceeding, but rather should consider such a fundamental change only through notice-and-comment rulemaking.

The practice of allocating funds to categories as if all eligible claimants had filed valid claims is efficient, predictable, and essential to settlement. If, contrary to precedent, unclaimed funds were allocated to each individual claimant in proportion relative to its share of the *entire*

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[12] PS Br. at 5.

[13] The Copyright Royalty Tribunal held instead that funds would be allocated "as if all eligible claimants in each category had filed valid claims." *1978 Cable Royalty Distribution Decision*, Copyright Royalty Tribunal, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980). The Tribunal reached that conclusion after ordering the parties to brief the issue of allocation of any "unclaimed funds" and receiving divergent briefs—including briefs that argued then, as Program Suppliers seems to argue now, that all unclaimed funds should be "distributed among all eligible claimants on the basis of their individual entitlements to the entire claimed portion of the royalty fund." *Id.* The Tribunal rejected that position. *Id.* The strength of that precedent has grown stronger with each subsequent proceeding, all of which have continued to allocate funds to each category as though all eligible claimants filed valid claims.

royalty fund pool, the entire scheme of program categorization largely would be pointless—leading to inefficiency and unpredictability, and hampering settlement.

Under Program Suppliers' preferred regime, each claim would have to be resolved in direct dispute with every other claim, because invalidating any one claim would fractionally increase *all* of the other claims' shares. Categories would serve little purpose then. If all Allocation Phase methodologies were required to reflect valuation and validity determinations for every individual claim, the limited Distribution Phase disputes of the past would balloon to include potential disputes over the validity and value of every single claim in every category, and such disputes may have to be litigated and resolved in the Allocation Phase and then incorporated into each Allocation Phase methodology—which would be difficult, if not impossible, for methodologies that have been used in prior Allocation Phase proceedings.

Unlike the Distribution Phase, the objective of the Allocation Phase is to determine the relative marketplace value of the programs represented by the respective Allocation Phase claimant categories.[14] As the Judges have found, these relative values are derived from the preferences revealed by Cable System Operators' ("CSOs'") selections of the bundles of programs that are broadcast on the stations they choose to retransmit from among those available to them.[15]

Whether valid or timely claims are properly filed by copyright owners for their programs has no bearing whatsoever on the relative marketplace value of programs actually carried on distant signals that CSOs have already decided to retransmit. CSOs make their carriage

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[14] *See, e.g., Distribution of Cable Royalty Funds* Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), 84 Fed. Reg. 3552 (Feb. 12, 2019) ("2010-2013 Cable Determination"), at 3555.

[15] *Id.* at 3555-3556.

decisions as of the beginning of the Accounting Period for which they pay royalties. Claims, by contrast, are filed only in July of the year following carriage, up to eighteen months after the carriage decision is made and the royalties are incurred.[16] It sometimes happens that a copyright owner eligible to claim royalties for a retransmitted program fails to file a claim by that July post-carriage deadline, or even that a filed claim is found, sometimes years later, not to have been timely filed.[17]

Program Suppliers' proposed "eligible program" restriction on the Allocation Phase category definitions would thus presumably require retroactive adjustments to be made, for a potentially indefinite period, to the relative market values of the programs the CSOs already chose to carry and already paid royalties for. The adjustments would be based on events that may take place years after the CSO's decision to retransmit a signal, even though those events are unknown to the CSO and have no effect on the royalties the CSO already paid for both "claimed" and "unclaimed" programs. For a multi-year consolidated case such as this one, Program Suppliers' proposed restriction would presumably require retroactive adjustments to be made separately for each claim year, based on an annual claims analysis, with the result, for example, that a CSO's decision to carry the same signal and pay the same royalties in two successive years would produce different overall Allocation Phase "relative market values" in the two years if a single copyright owner whose program appeared on the station in both years later inadvertently failed to file a timely claim for one of those years.

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16 47 USC §111(d)(4)(A).

17 *See, e.g., Universal City Studios, LLLP* v. *Peters*, 402 F.3d 1238 (D.C. Cir. 2005)(affirming District Courts' decisions in two underlying cases that the separate claims of MGM Studios and Universal for cable royalties for the year 2000 were not timely filed).

Program Suppliers' anticipated free-for-all Allocation Phase claim validation challenges likely may make it impossible to prepare comprehensive quantitative evidence and present it in a timely fashion. A party sponsoring a comprehensive quantitative study would need to assure itself of the claim status of each included program in each of the four years,[18] and this would encompass the programs of all Allocation Phase participants, not just the sponsoring party. Since the cable claims filed in July each year are not required to identify all (or, indeed, any) specific programs being claimed,[19] there would be no public source that would allow a party to assure that its comprehensive quantitative study covered only programs for which timely claims had been filed.

Notwithstanding the impossibility of independently validating the claims covering all retransmitted programs prior to the commencement of a proceeding, Program Suppliers seek a ruling authorizing "inter-Claimant Group discovery" on "whether the Allocation Phase methodologies presented by the Claimant Group representatives are properly limited to eligible works."[20] This would presumably also be followed (after discovery disputes are resolved) by motions to determine claim validity and motions to preclude the use of "unclaimed" programs in

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[18] For context, the regression study presented by CTV in the 2010-2013 Cable Royalty Proceeding covered 1,239,411 unique program ID's, *see* Corrected Written Direct Testimony of Christopher J. Bennett, Ph.D., filed Apr. 11, 2017, in Docket No. 14-CRB-0010-CD (2010-2013), at 6 Fig. 3, but each program ID might require up to four claim verifications over the four-year period.

[19] Existing regulations also exempt Music Claimants from identification of the numerous copyright owners represented by performing rights organizations. 37 C.F.R. § 360.4(b)(2)(i) ("With the exception of joint claims filed by a performing rights society on behalf of its members, a list including the full legal name, address, and email address of each copyright owner whose claim(s) are included in the joint claim.")

[20] PS Brief at 6. Because it would be impossible for a party independently to confirm the claim status of the million-plus programs, it seems unlikely that any party would undertake a costly comprehensive econometric study before the proceeding. Thus, there would be no comprehensive quantitative "methodologies" submitted as part of the Written Direct Testimony, and it is difficult to understand what this discovery would be based on.

quantitative relative-value evidence. The necessity of completing these new preliminary steps under Program Suppliers' proposed approach would likely dissuade any rational Allocation Phase participant from commencing the preparation of quantitative evidence until after their completion.

Program Suppliers' approach would increase litigation costs for all parties. Program Suppliers make no secret of the fact that they intend to derive a litigation advantage from inflicting expensive and burdensome discovery and claim-by-claim litigation on other parties. Program Suppliers' preferred regime also would delay final distributions of funds to the numerous claimants that, under the unclaimed-funds precedents, have managed to resolve intra-category disputes without Distribution Phase litigation. Complying with the discovery demands that Program Suppliers explicitly contemplates (PS Br. at 6) would be extremely burdensome for nearly all of the claimant groups.[21]

In addition, evisceration of the category system would make it extremely difficult, if not impossible, to predict future distribution shares, because the value and validity of any claim in any one year would necessarily have an impact on all other claimants. This unpredictability would be a significant obstacle to settlement, particularly where any one *individual* claimant could drag *all* the other parties into litigation over the specific value and validity of every claim. These results are contrary to the central purposes of the Section 111 statutory license and these distribution proceedings: efficiency, promotion of settlement, and elimination of transaction costs.[22]

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[21] The separate concerns in this regard of Music Claimants, the only claimant for musical works across all categories, has been previously set forth in its Motion to Quash Discovery in the 2010-13 Cable proceeding.

[22] *See Cablevision Sys. Dev. Co.*, 836 F.2d at 612 (recognizing "the congressional goal of minimizing transaction costs" in enacting Section 111); *see also id.* at 602–03.

By contrast, for the past 40 years, the established precedents regarding unclaimed funds have promoted predictability, settlement, and efficient resolution of the vast majority of disputes. Indeed, in many categories there have been very few or zero litigated Phase II disputes for the entire history of the cable royalty funds. Those claimants have worked diligently to resolve internal disputes through settlement and an agreed-to system for intra-category royalty allocation to eligible copyright owners. Program Suppliers' stated intention is to put an end to such intra-category resolution and instead force every claim within every category into litigation.

All of the unnecessary but extremely disruptive effects of Program Suppliers' proposals on the Allocation Phase proceeding have been avoided, of course, because of the CRT's decision in its very first distribution determination to treat "Unclaimed Funds" as a Distribution Phase issue rather than an Allocation Phase issue.[23] As the Tribunal found, the "subject was not appropriate to Phase I."[24] And while Program Suppliers now[25] seek to denigrate that approach as based on a "dated CRT ruling,"[26] it has been consistently followed ever since, and has avoided the kinds of insurmountable problems, increased costs and likely delays that Programs Suppliers' approach would create, as described above.[27]

Finally, restricting the Allocation Phase category definitions to "Claimed" programs, besides being disruptive and counterproductive, is simply unwarranted. The owners of

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[23] *See* 1978 Determination, 45 Fed. Reg. at 63042.

[24] *Id.*

[25] Program Suppliers' representative MPAA expressly supported that approach in the 1978 Proceeding, and argued that it would "promote production and development of programming in proportion to its use by cable systems and benefit to the viewing public." *See Order Regarding Discovery,* Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (July 21, 2016) at 7 (the "2010-2013 Order Regarding Discovery").

[26] PS Brief at 5.

[27] The Tribunal's Unclaimed Funds ruling is also binding precedent, which should not be ignored or overruled, for the additional reasons stated in the JSC Responsive Brief.

retransmitted programs for which timely claims are not filed will not receive royalties, either in the vast majority of distributions, made privately and consensually by the Claimant Category representatives following the Allocation Phase determination, or in the distributions directed by the Judges in the relatively tiny number of cases in which they must resolve Distribution Phase disputes.

2. The Judges Must Follow the Unclaimed Funds Precedents and Discovery Practices, Particularly Where There Has Been No Change in Circumstances.

Program Suppliers made the identical argument regarding the unclaimed funds ruling in 2016 in connection with the 2010-2013 Cable Royalty Distribution Proceeding, and the Judges rejected it.[28] Even absent the waiver issues that were present there, the Judges should reject the argument again.

Program Suppliers do not point to any change in circumstances or any change in the law that would provide a basis for departing from established precedent. Unlike in 2016, when Program Suppliers at least made a perfunctory effort[29] to respond to the Judges' request that Program Suppliers explain the basis that would support reconsideration of the longstanding rulings regarding categorization and unclaimed funds,[30] Program Suppliers' brief in this

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[28] *2010-2013 Order Regarding Discovery,* at 4-7.

[29] In 2016, the only change in circumstances identified by Program Suppliers was that one individual previously obtained royalties by fraud. Even if overturning the unclaimed-funds precedent somehow remedied that issue (which it would not), such an extreme ruling would do much more harm than good. For the vast majority of claimants, mutual trust still exists among the parties and has served as a basis for settlement and for efficient distribution of cable royalty funds to copyright owners. Program Suppliers should not be permitted to bootstrap the alleged fraud of a single claimant to upend the entire system that has overwhelmingly been characterized by good faith and fair dealing for 40 years.

[30] *See 2010-2013 Order Regarding Discovery*, at 2–3 ("[T]he Judges instructed the parties to address . . . whether the Judges should reconsider those prior rulings and, if so, on what basis.").

proceeding does not identify any change that would justify overturning the unclaimed-funds precedents.

First, even if the Copyright Royalty Tribunal's 1980 decision was "non-precedential" at the time it was issued (as Program Suppliers argue, PS Brief at 6), Congress's subsequent enactment of the Copyright Royalty and Distribution Reform Act of 2004, as codified at 17 U.S.C. § 803(a)(1), requires today's Judges to treat the Tribunal's prior determination as binding precedent—particularly where, as here, there has been no change in circumstances that would justify a departure from precedent.[31] Indeed, one of the core purposes of the Act was to eliminate the problem of "unpredictable and inconsistent" decisions by the Judges' predecessor panels.[32]

Second, the Judges are required by statute to adhere not only to the discovery rules, but also to the discovery practices in royalty distribution proceedings prior to 2004. 17 U.S.C. § 803(b)(6)(C)(viii) ("The rules and *practices* in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004, relating to discovery in proceedings under this chapter to determine the distribution of royalty fees, shall continue to apply to such proceedings on and after such effective date." (emphasis added)). Where intra-category distribution shares have been resolved by agreement and are not in controversy, category representatives have never been required to produce evidence of claim validity and the identity of each copyrighted work in their program category. The Act requires the Judges to continue to adhere to that longstanding discovery practice.

Third, even assuming the Judges may adopt such a fundamental change to the system of royalty distribution and discovery practices in these proceedings, the proper way to adopt such a

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[31] *See* 17 U.S.C. § 803(a)(1) ("The Copyright Royalty Judges shall act . . . on the basis of . . . prior determinations and interpretations of the Copyright Royalty Tribunal . . . .").

[32] 150 Cong. Rec. 3305 (Mar. 3, 2004) (statement of Representative Smith).

change would be through notice-and-comment rulemaking. As the Judges observed in 2016, if Program Suppliers had raised these issues by seeking a notice-and-comment rulemaking, it would have "avoid[ed] reliance by claimants and their representatives on the historical allocation process."[33] Program Suppliers chose not to initiate a rulemaking in the past three years, but instead are attempting to shoehorn this fundamental and potentially far-reaching issue into limited briefing in the course of an ongoing distribution proceeding, after the parties have already begun preparing their evidentiary cases. A rulemaking process would also permit the Judges to pose specific questions regarding the costs and benefits of such a change and the ramifications across the entire royalty distribution process, rather than merely considering briefs responding to an issue raised in five pages, without any factual support, by Program Suppliers. In a rulemaking proceeding, the parties could provide further information regarding the burdens and harms of Program Suppliers' proposed departure from precedent, including detailed information responsive to the Judges' questions of the kind submitted by several parties in 2016.[34]

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[33] *See 2010-2013 Order Regarding Discovery*, at 6 n.10 (July 21, 2016).

[34] *See, e.g.*, Responsive Brief of the Public Television Claimants on Discovery Issues, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Responsive Brief of Canadian Claimants Group on Discovery Issues, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Joint Responsive Brief of National Association of Broadcasters and Broadcaster Claimants Group on Discovery Issues, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Responsive Brief of the Joint Sports Claimants, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Music Claimants' Responsive Brief Pursuant to Order Dated April 12, 2016, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Responsive Brief of National Public Radio, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Settling Devotional Claimants' Responsive Brief Regarding Discovery, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (May 18, 2016); Post-Hearing Memorandum of the Public Television Claimants on Discovery Issues, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (June 22, 2016); Post-Hearing Memorandum of the Joint Sports Claimants, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (June 22, 2016); Summation of Position of Commercial Television

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3. Program Suppliers' Proposal to Add Program Content "Type" to Some of the Claimant Category Definitions is Unnecessary and Counterproductive.

Program Suppliers next argue, contrary to their acknowledgement that the category definitions describe claimant types rather than program content types, that the definitions should be "clarified" by adding various new references to "sports programs" along with a number of confusing and inconsistent cross-references to "program types."[35] Program Suppliers have provided no showing that such changes are needed,[36] but the proposed changes are unworkable as well as being inconsistent with the fundamental structure of these proceedings and the purpose of the Allocation Phase.

By injecting the concept of "program types" into a number (but not all) of the category definitions, for purposes of either exclusion or inclusion, Program Suppliers would introduce intractable ambiguities. Just as a single example, by modifying its own category definition to exclude "programs that fall within program types for" (rather than "programs that fall within") the CTV claimant group definition, Program Suppliers would presumably exclude program content "types" such as news, talk shows, sports-related shows, awards shows, documentaries, and more from its own category. But Program Suppliers' proposed "clarification" to the CTV group definition creates the same overbroad exclusion in the other direction ("except those programs that fall within the program types for . . . the Program Suppliers"). These two changes,

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Footnote continued from previous page
Claimants Group on Discovery Issues, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (June 22, 2016).

[35] Program Suppliers' "redline" version of the category definitions is incomprehensible, since, among other confusing cross-references, it includes apparent changes to language that was not part of the original category definitions. *See* PS Brief at Appendix A.

[36] Indeed, when comparing quantitative studies that categorized all individual programs based on the original category definitions, Program Suppliers witness Dr. Gray testified that there was a 93.5% match on individual categorizations, and that the differences produced only modest changes in his study's results. 2010-2013 Cable Determination, 84 Fed. Reg. at 3598-3599.

by using the undefined concept of "program types for" the two claimant categories as a cross-reference, create an irreconcilable conflict.[37] By contrast, the unchanged category definitions, which have been applied and relied upon by the parties for decades in these proceedings, distinguish clearly between syndicated programs that are distributed for broadcast on commercial television stations (Program Suppliers) and programs that are created by or for a commercial television station and aired only on that station – i.e., not syndicated (CTV), without regard to the content type of any particular program.

Program Suppliers also propose to introduce a single program content type – "sports programs" – into three of the eight category definitions. Again without providing any justification or need for mixing a content type with the category definitions, Program Suppliers would sow unnecessary confusion. The very fact that Program Suppliers asserts that "sports programs" are found in the CTV and Program Suppliers categories demonstrates that adding the content type to the definitions will not assist in applying what are, by design, mutually exclusive category definitions. But Program Suppliers' proposal is also under-inclusive, in two different ways.

First, Program Suppliers provides no definition of the scope of its "sports program" content type, but it may fairly be interpreted as encompassing, for example, a documentary series about baseball or a program about hunting and the outdoors, among many others. Such "sports" programs, added to traditional and non-traditional sports game telecasts, may be found within the Allocation Phase categories for Canadian Claimants and Public Television Claimants, not just within Program Suppliers, CTV, and Joint Sports Claimants. Even if the addition of this

[37] Similarly confusing is Program Suppliers' proposed addition of a "program types" qualifier to the Music Claimants definition, which makes no sense as it has always been the case that all musical works across all categories are represented within the Music Claimants category.

program content reference would help clarify rather than simply confuse the Allocation Phase categorization, including it in fewer than all the categories where such programs appear would introduce bias and distortion.

Second, if the Judges were somehow to determine that it was appropriate or useful to reflect program content types rather than claimant groups in the Allocation Phase category definitions, all applicable program content types, not just the one Program Suppliers have selected, would need to be included. Of course, the entire structure of the categories would be different if they were based on program types instead of claimant types,[38] but all of the program types would need to be included in order to have a comprehensive and mutually exclusive set of program categories. And because the same program type appears in different claimant categories, an Allocation Phase determination based on program type categories would necessarily be followed by an extensive Distribution Phase proceeding in which the Allocation Phase award for, say, "documentary" or "talk show" or "health" programs would have to be divided among the same types of programs owned by claimants represented by Program Suppliers, CTV, PTV, Canadian Claimants, and Devotional Claimants. This problem would only be exacerbated if the program types were rolled up into fewer content categories.

In sum, injecting program content types into the Allocation Phase category definitions as Program Suppliers propose would fundamentally undercut the efficiency that the statutory license was created to achieve.

[38] Program Suppliers says it will propose additional categories if the Judges were to shift the nature of the categories from claimant type to program type, PS Brief at 2-3, and the Certain 2014-17 Cable Participants would also seek leave to do so.

B. Multigroup Claimants' Argument is Illogical and Unsupportable

Multigroup Claimants ("MGC") challenge only the Allocation Phase definition of the Joint Sports Claimants category.[39] Its entire argument starts from the premise that the definitions are categories of program content, not claimant type, which is fundamentally in error, as explained above and as agreed by all the Allocation Phase parties.[40] MGC compounds this error with a basic error of logic, essentially assuming that because all programs in the Joint Sports Claimants category are "sports programs," all "sports programs" must be in the Joint Sports Claimants category.

MGC, seeking to redefine the Joint Sports Claimants category as a new but undefined[41] "sports programming" category, makes a number of dubious assertions without any factual support. It asserts, for example, that the relative market value of programs to a CSO would be unaffected by whether a game telecast is live or not,[42] whether it is a professional or college game rather than a non-collegiate amateur game,[43] whether the telecast is of team-against-team contests or ice skating, golf, or boxing matches,[44] or whether the station broadcasting a sports program is a Canadian, Mexican, or US station.[45] In past proceedings, the Judges have

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39 MGC Comments at 7.

40 *See* Background section, *supra,* PS Brief at 2.

41 MGC does not expressly address the scope of its proposed definition of "programming of a predominately sports nature." *See* MGC Comments at 15-16. But it makes mention of a "sports highlights show," *id.* at 12, so the new category would presumably require the reassignment of coaches' shows, pre-game and post-game shows, season previews, and all manner of other "sports" programs that are currently covered in the CTV, PTV, Program Suppliers, and Canadian claimant categories.

42 MGC Comments at 9.

43 *Id.* at 10.

44 *Id.*

45 MGC Comments at 11.

determined that live professional and collegiate team sports had a high relative market value.[46] MGC's obvious objective in proposing a redefinition of the Joint Sports Claimants category is to receive the royalty award premium associated with live professional and collegiate team sports. But MGC has made no showing that "other sports" command a similar premium, and, in fact, prior studies showed they did not.[47]

CONCLUSION

For the reasons stated above, the Certain 2014-17 Cable Participants urge the Judges to adopt the Allocation Phase categories and program category definitions set forth in Appendix A to their Joint Comments for purposes of the 2014-17 cable royalty distribution proceeding.

Respectfully submitted,

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46 2010-113 Cable Determination, 84 Fed. Reg. at 3552.

47 *See, e.g.,* 2010-2013 Cable Determination, 84 Fed. Reg. at 3584-3585 & Table 12 (Horowitz Survey results showing much higher shares for Joint Sports Claimants programs than for "other sports").

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Proof of Delivery

I hereby certify that on Friday, May 03, 2019 I provided a true and correct copy of the Joint Responsive Brief of Certain 2014-17 Cable Participants on Allocation Phase Claimant Category Definitions to the following:

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Program Suppliers, represented by Gregory O Olaniran served via Electronic Service at goo@msk.com

circle god network inc d/b/a david powell, represented by david powell served via Electronic Service at davidpowell008@yahoo.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Joint Sports Claimants, represented by Robert A Garrett served via Electronic Service at robert.garrett@apks.com

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Signed: /s/ Ann Mace